MACROTAC ENTERPRISE & ORS A

v.

PENGARAH PENDIDIKAN NEGERI SELANGOR & ORS

HIGH COURT MALAYA, SHAH ALAM B
NOR BEE ARIFFIN JC
[CIVIL SUIT NO: MT6-21-31-2000]
29 DECEMBER 2009

CONTRACT: *Formation - Supply of Student Identification Cards - Letter of approval by first defendant State Education Director - Whether binding on Government - Whether first defendant not authorized to grant approval - Whether no valid contract concluded thereof - Whether contract unenforceable and void ab initio - Government Contracts Act, 1949 ss. 2, 3, 6, 8, 9 - Government Proceedings Act, s. 5* C D

STATUTORY INTERPRETATION: *Construction of statutes - Literal approach - Section 2, Government Contracts Act 1949 - Whether language plain, precise and unambiguous - State Education Director entering into contract on behalf of the Government - Whether requiring written authorization of the Minister of Education - Contract executed without Minister's prior authorization - Whether void ab initio - Whether unenforceable against Government* E

The first plaintiff ran a printing and supply of stationary and office equipment business. The second and third plaintiffs were partners in F the business. Sometime in November 1996, the plaintiffs made a proposal to the first defendant ('Encik Zainul Abidin'), the Pengarah Pendidikan, Jabatan Pendidikan Negeri Selangor ('JPS') offering to supply Student Identification Cards ('SIC') for 630,000 students in the State of Selangor ('the project'), and, upon the JPS G approving the project, made various preparations to undertake and execute the project. Subsequently, however, the project was terminated by the third defendant Minister of Education following objections from the public. The plaintiffs alleged that the termination was without notice and unlawful, and in the event H claimed RM992,250 from the defendants, being the net income they could have earned from the project had it not been terminated by the Minister. The defendants maintained that Encik Zainul Abidin, in granting approval, was acting without authorization and in his own personal capacity, with the result that any contract, if at all I

A concluded between him and the plaintiffs, was void and not binding on the defendants. It was further averred that the contract was irregular and had contravened the prescribed procedures applicable to contracts made on behalf of the fourth defendant Government of Malaysia. The plaintiffs retorted that they were not in breach of any B of the defendants' procedures and regulations. Such procedures and regulations, according to the plaintiffs further, were the defendants' own internal administrative matters and were of no concern to them.

Held (dismissing plaintiffs' claim with costs):

C **(1)** The language used in s. 2 of the Government Contracts Act ("Act") is plain, precise and unambiguous. By the literal construction, it simply requires a written authorization by the third defendant if Encik Zainul Abidin was to make a contract for and on behalf of the fourth defendant. Consequently, any D contract entered by Encik Zainul Abidin without such written authorization would be *void ab initio*. To say otherwise would tantamount to not giving a provision of the law the interpretation meant by the Legislature. *Affin Credit (M) Sdn Bhd v. Yap Yuen Fui* (foll); *Suwiri Sdn Bhd v. Government of the* E *State of Sabah* (foll). (paras 7 & 8)

(2) The plaintiffs had not discharged the onus on them to prove that there was in existence a written authorization issued by the third defendant and that the letter of approval was valid and F binding and legally issued by Encik Zainul Abidin pursuant to s. 2 of the Act. The absence of the written authorization must mean that Encik Zainul Abidin had not been delegated with the authority to act for the fourth defendant. (paras 9 & 10)

G **(3)** The approval as contained in the letter dated 4 December 1996 must be held to be *void ab initio* and cannot be enforced against the defendants. The letter by Encik Zainul Abidin would also be deemed to be made without the authority of the fourth defendant by virtue of s. 6 of the Act. Consequently, the H defendants cannot be held liable to the plaintiffs based on the said letter of approval. The said letter had not created any rights to the plaintiffs nor any obligations on the defendants. Accordingly the issue of payment of damages does not arise. Encik Zainul Abidin, by reason of s. 8 of the Act, must also I be held to be personally liable for contracting otherwise than as an agent of the fourth defendant. *Suwiri Sdn Bhd v. Government of the State of Sabah* (foll). (para 10)

(4) The Instructions, Circulars, Surat Pekeliling Ikhtisas or Surat Siaran served as directives, guidelines and references are meant for the smooth running of the organizations of the defendants. They are internal matters of the defendants and therefore cannot be imposed on the plaintiffs in the same manner they are imposed on and apply to public officers. Thus, non-compliance by Encik Zainul Abidin in this respect bears no direct nexus to the plaintiffs' case. (paras 13 & 14)

Case(s) referred to:
Affin Credit (M) Sdn Bhd v. Yap Yuen Fui [1984] 1 CLJ 149; [1984] 1 CLJ (Rep) 62 FC ***(foll)***
Attorney-General For Ceylon v. AD Silva [1953] AC 461 ***(foll)***
Maslinda Ishak v. Mohd Tahir Osman & Ors [2009] 6 CLJ 653 CA ***(dist)***
Royal British Bank v. Turquand [1856] 119 ER 886 ***(refd)***
Suwiri Sdn Bhd v. Government of the State of Sabah [2008] 1 CLJ 123 FC ***(foll)***
Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd [1998] 1 CLJ Supp 147 ***(refd)***
Tan Leng Choo v. Law Teck Huat [2008] 1 LNS 568 ***(refd)***
Wong Pot Heng v. Zainal Abidin Putih & Anor [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312 SC ***(refd)***

Legislation referred to:
Financial Procedure Act 1957, s. 4
Government Contracts Act 1949, ss. 2, 3, 6, 8, 9
Government Proceedings Act 1956, s. 5
Hire Purchase Act 1967, s. 4(1)

For the plaintiffs - James D Culaz; M/s Culaz & Assoc
For the defendants - Nadia Hanim Mohd Tajuddin SFC

Reported by Susheila Sreedharan/Wan Sharif Wan Ahmad

JUDGMENT

Nor Bee Ariffin JC:

Case For The Plaintiffs

[1] The first plaintiff ran a business in printing and supplying of stationary and office equipment. The second and third plaintiffs were partners in the business. It was the plaintiffs' case that they made a proposal *vide* a letter dated 15 November 1996 to the first

defendant, the Pengarah Pendidikan, Jabatan Pendidikan Negeri Selangor (JPS) offering their services to supply Student Identification Cards ("SIC") for 630,000 students in the State of Selangor. This wasn't their pioneer project as they had previously implemented similar SIC projects in Penang and Perak. Their proposal was well received by JPS, evidenced by its letter dated 4 December 1996. They even had the edge over their ventures in Penang and Perak as the JPS made it compulsory for the 630,000 students to use the SIC. It was only optional in the other two States. Acting on the said approval, the plaintiffs made various preparations for the issuance of the SIC and had incurred expenses. The project was however brought to an abrupt end when the third defendant announced the termination of the project in late April 1997. This was supposedly due to objections by many quarters including the parents. The plaintiffs claimed the termination was without notice and they only learnt of it through the press. They estimated their gross income generated from the sale to be RM1,260,000 on the basis of RM2 per card for 630,000 students and were expected to rake in a net income of RM992,250 after deducting expenditure of RM267,750. This action was filed claiming the income they estimated to have earned had the implementation of the SIC project not been wrongfully put to halt.

Case For The Defendants

[2] The defendants pleaded that Encik Zainul Abidin bin Awang the Pengarah Pendidikan Negeri Selangor at the material time when dealing with the plaintiffs and granted the said approval had acted alone, in his own personal capacity without authorization, knowledge, consent and approval of the third and fourth defendants. The contract alleged to have come into existence was therefore void and not binding on the defendants as Encik Zainul Abidin had not acted as an agent of the fourth defendant. Further to that, the contract entered into between the plaintiffs and Encik Zainul Abidin was irregular and in contravention of the prescribed procedures applicable to contracts made on behalf of the fourth defendant. As no valid contractual relationship was created between the plaintiffs and the defendants, the defendants averred that they were not liable for any loss of profits alleged to have been suffered by the plaintiffs.

Plaintiffs' Contention

[3] The second and third plaintiffs testified that even though all dealings pertaining to the proposal were made directly to the first defendant and that the proposal had never at all been taken up to the third and fourth defendants, the first defendant was nevertheless representing the State of Selangor and the fourth defendant in all respect as he was then the most senior officer having the charge of education in Selangor. Despite agreeing that the letter dated 4 December 1996 was wanting in particulars as there was no provisions made on the effective date of the approval, the duration of the period of implementation and supply of the SIC, pricing and most importantly on whether an agreement would be formalized, the plaintiffs insisted that there was nothing irregular about the manner the dealing was transacted as it was no less different than the previous dealings they had with Penang and Perak. As it concerned them, they were not in breach of any procedures and regulations of the defendants and if there had been any such occurrence, the first defendant should have known better. They testified that they were not advised of the application of such laws and regulations and neither were they supplied with copies of the circulars or directives or guidelines or notified of the impropriety of the matter at hand. The letter dated 4 December 1996 was never withdrawn so the contract that had been concluded remained binding on the defendants. The laws to them are meant to govern the conduct of the Government officials in running their businesses and it matters not to them whether there had been such non-compliance or otherwise on the part of the first defendant as those were the defendants internal concern and shall not affect them in any manner.

Defendants' Contention

[4] The defendants stood firm on the apparent lack of authority on the part of Encik Zainul Abidin in dealing with the plaintiffs and eventually in approving the proposal, saying that an official in his position and capacity was under a duty to conform to the manner a contract is made on behalf of the fourth defendant as provided in the Government Contracts Act 1949 (Act 120), the Financial Procedure Act 1957 (Act 61) and the Treasury Instructions issued by the Treasury pursuant to s. 4 of Act 61. Four witnesses gave evidence for the defendants to establish the non-compliance

with such prescribed procedures Encik Zainul Abidin was said to be guilty of. DW1, an officer of the Ministry of Education attached to the Bahagian Perolehan dan Pengurusan Aset Kementerian Pelajaran, dealt at length on the procedures relating to procurement of supply and services for the Ministry and its State Education Departments, educational institutions or schools. Procurement, he said, could only be effected by means of open tenders, submission of quotations, direct purchases or direct negotiations as stipulated in the various Treasury Instructions, Treasury Circulars and Guidelines issued by the Ministry of Finance. The Treasury Circular No. 9 of 1995 on Lembaga Perolehan Dan Jawatankuasa Sebutharga was in operation in 1996 until 2007. By para. 11 of the said Circular, a procurement exceeding RM50,000 must be by tender. A government official, said DW1, could only undertake a procurement if he was delegated with such power by the Minister of Education pursuant to Act 120 and Act 61.

DW2 was prior to 10 June 2009 served the Sektor Pengoperasian Dasar & Keurusetiaan Kementerian Pelajaran which is responsible for the issuance of Surat Pekeliling Ikhtisas. He was called to testify on the purpose of Surat Pekeliling Ikhtisas and that of Surat Siaran. His explanation showed that "Surat Pekeliling Ikhtisas merupakan satu arahan/panduan/penerangan atau penjelasan yang dikeluarkan oleh Ketua Pendaftar (Ketua Pengarah)" whilst Surat Siaran "boleh dikeluarkan oleh Pengarah Negeri tetapi mesti selari dengan dasar, peraturan atau prosedur Surat Pekeliling Ikhtisas yang dikeluarkan oleh Ketua Pendaftar." To DW2, the letter dated 3 April 1997 was clearly a Surat Siaran. By his evidence, the defendants were seeking to establish that the letter carried no significance whatsoever since there was no Surat Pekeliling Ikhtisas issued by the second defendant on the SIC for Encik Zainul Abidin's Surat Siaran to fall back to.

DW3 is currently having the charge of managing disciplinary cases in the Ministry of Education. She testified that following the findings of an investigating committee that was set up in 1997 to probe into the SIC project in Selangor, disciplinary action was taken against the first defendant. Encik Zainul Abidin was found guilty of misconduct for breaching the regulations on procurements relating to the SIC project. His colleagues in Penang and Perak were not spared either. D1 was reprimanded and fined and was transferred out

of Selangor on administrative basis. The learned solicitor for the Plaintiffs, Mr. James D. Culaz objected on the admissibility of DW3's testimony relating to the disciplinary actions taken against the State Education Directors of Penang and Perak and Encik Zainul Abidin on the basis that it was not pleaded and not put to the plaintiffs. I dismissed the objection. Question was put to the second plaintiff with respect to the disciplinary action against the State Education Director of Penang. It is pertinent to note that it was the plaintiffs' case that the project was first initiated by them in Penang before moving on to Perak and Selangor. If such proceeding was taken against the Director in Penang, I would consider questions on similar action being taken against the other two to be relevant. As regards the pleading, the defendants had sufficiently pleaded that there were irregularities in the dealing conducted by Encik Zainul Abidin and he had contravened the procedures applying. The alleged contract was claimed to be unenforceable. The natural consequence in cases where public officers acted otherwise than falling in line with the Government procedures and directives is to expect a disciplinary proceeding to take place. I do not think there is any element of surprise that may be adverse to the plaintiffs in the evidence of DW3 that such proceedings had in fact been taken against the three.

The evidence of DW4 who is the Ketua Sektor Khidmat Pengurusan dan Pembangunan at the JPS showed that the prescribed procedures as described by DW1 did not authorize a State Director of Education to undertake a procurement that has to go through a tender process. One risks facing the disciplinary authority in instances of contravention thereof.

Issues

[5] I sum up the issues for determination by this court to be as follows:

(a) whether Encik Zainul Abidin has the authority for and on behalf of the fourth defendant to grant the approval on the use of the SIC;

(b) whether a letter of approval dated 4 December 1996 from Encik Zainul Abidin constituted a valid and binding contract as between the plaintiffs and the defendants; and

(c) whether there was any breach on the part of the defendants that had caused the plaintiffs to suffer damages.

Findings Of The Court

[6] The making of a contract on behalf of the Federal Government and the Governments of the States and for matter connected therewith are governed and regulated by statute with the passing of Act 120. Section 2 of the Act prescribed the requirements in the following terms:

Contracts on behalf of the Government

2. All contracts made in Malaysia on behalf of the Government shall, if reduced to writing, be made in the name of the Government of Malaysia and may be signed by a Minister or by any public officer duly authorized in writing by a Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorization.

Section 9 provides that an authorization shall be in the form as set out in the Schedule to the Act. The effects of a contract not made in accordance with s. 2 is provided for in s. 6 which states the following:

No other contracts to be deemed Government contracts

6. No contracts made after the commencement of this Act except those made in the manner herein provided shall be deemed to be made by the authority of the Government or of a State Government, as the case may be.

And, on the extent of liability of a public officer making a contract, s. 8 provides the following:

Limitation of personal liability of public officer

8. No public officer shall be liable to be sued personally upon any contract which he makes in that capacity; but a public officer shall be personally liable when he expressly pledges his personal credit, or where he contracts otherwise than as the agent of the Government or of a State Government.

[7] The language used in s. 2 of Act 120 is plain, precise and unambiguous. The literal and strict construction rule must then apply in interpreting the said provision (*Wong Pot Heng v. Zainal Abidin Putih & Anor* [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312). By the literal construction, it simply requires a written authorization by the third defendant if Encik Zainul Abidin was to make a contract for and on behalf of the fourth defendant. If there be no written authorization given to Encik Zainul Abidin prior to the making of the letter dated 4 December 1996, the contract alleged by the plaintiffs to have been created must be found to be *void ab initio*. To say otherwise would tantamount to not giving a provision of the law the interpretation meant by the Legislature. Support is found in the Federal Court decision in *Affin Credit (M) Sdn Bhd v. Yap Yuen Fui* [1984] 1 CLJ 149; [1984] 1 CLJ (Rep) 62. The court deliberated on the question of whether non-compliance with the provision of s. 4(1) of the Hire Purchase Act 1967 (Revised 1978) would render a hire purchase agreement *void ab initio* and ruled:

> Section 4(1) contains a positive and mandatory obligation on the part of the owner to give a written statement to the prospective hirer **before** an offer to enter into a hire purchase agreement can be accepted and thereby brings about the formation of an agreement. This is the plain meaning of such words as "Before any hire purchase agreement is entered into" and "unless the written statement was given to the prospective hirer" used in s. 4(1). There is no gap in that provision and there can be no other interpretation unless we want to make nonsense of the words used by the Legislature. That would exactly be the result if we were to conclude that although the obligation imposed by the sub-section was mandatory it had practically no purpose and had no meaningful consequences.

[8] A direct authority on the construction of the interpretation of s. 3 of Act 120 the equivalent provision of which is contained in s. 2 of the Act as regards the Federal Government, is the Federal Court case of *Suwiri Sdn Bhd v. Government of the State of Sabah* [2008] 1 CLJ 123. In that case, the appellant was granted a licence to fell and extract timber comprising an area of 5,665.59 hectares in a forest reserve in Keningau, Sabah. The licence was valid for five years from 13 March 1993 to 13 March 1998. Because the appellant was unable to extract timber within the period stated in the licence, an application was made to the Setiausaha Hasil Bumi (SHB) for an extension of time of the licence. The SHB in his

letter dated 25 November 1997 to the Director of Forestry stated that he agreed to have the licence renewed for the whole concession area of 5,665.59 hectares for a period until 31 December 1999 but subject to two qualifications. Contrary to what the SHB had indicated, the respondent instead of renewing the extension, decided to issue a new licence to the appellant reducing the concession area to 2,204.41 hectares. The remaining area was distributed to three other companies under three separate licences. In answering the two questions posed namely, whether the SHB for and on behalf of the Sabah State Government has the authority to approve the granting of any rights in or over a forest reserve or state land in Sabah and whether the letter of approval signed by him and communicated to the appellant created a binding contract to renew or extend the timber licence, the Federal Court had these to say:

> The focal issue that needs consideration now is under what circumstances can a public officer be legally authorized to enter into such a contract for timber licence with the Appellant. In our view it can only be done if the requirements of s. 3 of the 1949 Act are satisfied. In other words, the public officer must obtain the authorization of the Minister in writing to act on behalf of the State Government. To apply those requirements as stipulated by s. 3 of the 1949 Act to the instant case, the Setiausaha Hasil Bumi, a public officer, must show that he has the written authorization of the Minister before he could act on behalf of the Respondent on any dealing over the said Forest Reserve. Without the necessary written authorization of the Minister then his action would be void and invalid. There was nothing before us nor at the courts below any evidence adduced by the Appellant to show that the Setiausaha Hasil Bumi had been granted with such written authorization to act on behalf of the Sabah State Government. Therefore, it simply means that the Setiausaha Hasil Bumi had not been delegated with the authority to act for the Respondent. In the circumstances our answer to the first question would be in the negative.
>
> On the basis of the principle as stated above, the Respondent could not be under an obligation to be bound by the terms of the alleged approval letter because the Setiausaha Hasil Bumi had no legal capacity to act on behalf of the Respondent. It is not in dispute that when he wrote the impugned letter to the Director of Forestry the Setiausaha Hasil Bumi signed it in his capacity as the Setiausaha Hasil Bumi and not acting for and on behalf of the Minister. As we have discussed earlier, the Setiausaha Hasil Bumi can only act lawfully if he obtains the necessary written authorization from the Minister. He had no such written authorization.

> For the reasons as mentioned above we arrived at the finding that the letter of approval signed by the Setiausaha Hasil Bumi, who, without authorization of the Minister, had not created any rights whatsoever to the Appellant nor any obligations on the Respondent. In the circumstances our answer to the second question is also in the negative.

[9] Applying the principles enunciated in *Suwiri Sdn Bhd* and *Affin Credit (M) Sdn Bhd* to the present case, I have no hesitation to answer the first and second issues in the negative. The letter dated 4 December 1996 was not signed by the third defendant. As a prerequisite for Encik Zainul Abidin to sign the said letter in acting for and on behalf of the fourth defendant, there must be a written authorization from the third defendant to him in the format referred to earlier. If there was no such written authorization then Encik Zainul Abidin had not been delegated with the authority to act for the fourth defendant. Obviously there was no authorization for the plaintiffs had not proved there was one in existence. What had taken place was the plaintiffs, instead of coming forward to show that Encik Zainul Abidin indeed had the necessary written authorization, claimed that to be the defendants' internal administrative matters, that they were never advised on the law and that was of no concern to them. But they were wrong in not making it their business to know. Claiming to be ignorant of the law does not help either. In *Suwiri Sdn Bhd*, the Federal Court made it clear that it was for the appellants to show that the Setiausaha Hasil Bumi had been granted with such necessary written authorization to act on behalf of the Sabah State Government, and they had failed to do that. The Federal Court in *Johara Bi v. Lawrence Lam* 1 [MLJ] 139 signified its approval with the judicial approach taken by the learned trial judge on the burden of proof "that until and unless the plaintiff had discharged the onus on her to prove her case on a balance of probabilities the burden did not shift to the defendant and no matter if the defendant's case was completely unbelievable, the claim against him must in this circumstance be dismissed." (also the case of *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ Supp 147).

[10] Back to the present case, in the light of the decision in *Suwiri Sdn Bhd* which I am bound to follow, I hold the view that the plaintiffs had not discharged the onus which lie on them to prove that there was in existence a written authorization issued by

A the third defendant and that the letter of approval was valid and binding as it was legally issued by Encik Zainul Abidin in pursuance of s. 2 of Act 120. Consequent to that, no evidential burden has shifted to the defendants as the plaintiffs have not proved their case. That aside, the evidence of SP3 indicates clearly that Encik Zainul
B Abidin had no legal capacity to act for and on behalf of the fourth defendant with the outcome of the disciplinary action taken against him. The approval as contained in the letter dated 4 December 1996 must therefore be held to be *void ab initio* and cannot be enforced against the defendants. The letter by Encik Zainul Abidin
C would also be deemed under the circumstances to be made without the authority of the fourth defendant by virtue of s. 6 of Act 120. As in *Suwiri Sdn Bhd*, the defendants in the present case could not be held liable to the plaintiffs' claims based on the said letter of approval. The said letter had not created any rights to the plaintiffs
D nor any obligations on the defendants. With these findings, the circumstances no longer warrant me to proceed to answer the third issue as payment of damages does not arise. The plaintiffs' claim against the defendants is unsustainable and it is Encik Zainul Abidin who must by reason of s. 8 of Act 120 be held to be
E personally liable for contracting otherwise than as an agent of the fourth defendant.

[11] In arriving at the findings as I had in this case, I had rejected the argument by Mr. Culaz in his written submission that the
F defendants which have not at any time withdrawn the letter of approval or declared it as invalid must then by necessary implication be held to admit the validity of the said letter from the date of its issuance until the date of the termination of the contract, as untenable and devoid of merits. I also considered as misplaced the
G propositions set forth by Mr. Culaz that firstly, the rule in *Royal British Bank v. Turquand* [1856] 119 ER 886 should apply. Secondly, this court should also take into consideration the principles of apparent or ostensible authority where the first defendant must be regarded as having the ostensible authority to issue the letter of
H approval and lastly, the issue of the operation of an estoppel. On the rule in *Turquand*, I am of the view that the rule has no application as regards the operation of s. 2 of Act 120 but could be a subject of argument in matters pertaining to application of the Treasury Circulars and Treasury Instructions on procurement. On
I the issue of ostensible authority, there is no doubt that Encik

Zainul Abidin was the most senior officer in charge of matters relating to education in Selangor at the material time. But as submitted by Cik Nadia Hanim Mohd Tajuddin the learned Senior Federal Counsel appearing for the defendants, he was not clothed with authority to get himself involved in the SIC dealing with the plaintiffs. The principles of ostensible authority which is premised on the principal-agent relationship has no application whatsoever as the very thrust of the matter is that Encik Zainul Abidin must obtain the required written authorization from the third defendant prior to the issuance of the letter of approval in order to clothe him with the authority to act as an agent of the fourth defendant in the dealing with the plaintiffs. The plaintiffs as I had said earlier failed to show that he had obtained one. It follows therefore Encik Zainul Abidin could not then be acting as the agent of the fourth defendant. If ostensible authority is not successfully established, inevitably the plaintiffs' assertion on the operation of an estoppel against the defendants must also fail. Again, on the issue of ostensible authority, I refer to the decision of the Privy Council of in *Attorney-General For Ceylon v. A. D. Silva* [1953] AC 461 to conclude why in my view the principles advanced by Mr. Culaz have no application to the present case and is misconceived; and the relevant extract from the head note read as follows:

> It is a simple and clear proposition that a public officer has not by reason of the fact that he is in the service of the Crown the right to act for and on behalf of the Crown in all matters which concern the Crown. The right to act for the Crown in any particular matter must be established by reference to statute or otherwise. It has not been shown that the Principal Collector had any authority to sell the property of the Crown or to enter into a contract on its behalf for its sale: nor has it been shown that the Chief Secretary, who authorized the sale, had any such authority. His functions were defined by the Ceylon (State Council) Order in Council, 1931, and under this Order the most that can be said is that he was authorized to deal with certain Crown property under the direct administration of the Government of Ceylon. It is therefore clear that the Principal Collector of Custom had no actual authority to enter into a contract for the sale of the goods which are the subject- matter of this action.
>
> All "ostensible" authority involved a representation by the principal as to the extent of the agent's authority, and no representation by the agent as to the extent of his authority could amount to a "holding out" by the principal. No public officer, unless he

A possessed some special power, could hold out on behalf of the Crown that he had the right to enter into a contract in respect of the property of the Crown when in fact no such right existed. The act of the collector in advertising the goods for sale could not be said to be the act of the Crown, and nothing done by the collector or by the Chief Secretary amounted to a holding out by the Crown that the collector had the right to enter into a contract to sell the goods.

[12] Mr. Culaz also urged me to further consider the liability of the defendants in the light of the decision of the Court of Appeal in *Maslinda Ishak v. Mohd Tahir Osman & Ors* [2009] 6 CLJ 653. In that case, the court unanimously set aside the decision of the learned trial judge who had found the act of the first defendant in taking numerous pictures of the appellant urinating in the truck she and several others were placed in after being arrested during a raid conducted by Jawi enforcement and Rela members, as a frolic of his own and such action could not be associated with the Director General of Rela, the Director of Jawi and the Federal Government. The three, ruled the Court of Appeal, were vicariously liable, jointly and severally. Mr. Culaz submitted that the decision should apply to the present case and the defendants be made liable to compensate the plaintiffs. Cik Nadia argued that the learned solicitor had applied wrong principles of law in failing to distinguish the cause of action in *Maslinda binti Ishak* which was based on tort for invasion of privacy as opposed to the present case which was based on contract. I subscribe to the submission by Cik Nadia that *Maslinda binti Ishak* must be distinguished. The decision of the Court of Appeal was premised on wrongful action in tort for invasion of privacy by the first defendant and the cases referred to concerned tortious liabilities. The headnote of the report at p. 654 reads:

> On the facts, the 1st defendant was present at the scene, not on his own volition, but on instruction. He was not only under the direct supervision of RELA but was, on that particular night, also subject to the direction of JAWI, with his duties shuttling from ensuring the security of those who participated in the exercise to keeping an eye over those who were arrested. Since the 1st defendant took the unauthorized photographs in the course of the work he was instructed to carry out, at a time when the operation was in progress, the respondents must be held to be vicariously liable. It is trite law that when an injury or loss is caused to a third person by the wrongful act of an agent acting within the scope of his authority,

his principal is jointly and severally liable with him. Thus, the respondents must jointly and severally bear the burden of the first defendant's liability. *Keppel Bus Co Ltd v. Sa'ad Ahmad* (foll); *Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors* (foll); *Yeo Tin Sang v. Lim Choo Kee* (foll). (paras 22 & 23).

It is significant to note that s. 5 of the Government Proceedings Act 1956 (Act 359) makes specific provision on liability of the Government in tort. It made no reference to action based on contracts. The decision in *Suwiri Sdn Bhd* did not hold the Sabah State Government to be vicariously liable for the action of the Setiausaha Hasil Bumi. Not only the case of *Maslinda Ishak* has no application to this case in the premise stated, perusal through the statement of claims reveal that the relief sought by the plaintiffs against the defendants were not on the basis that they were to be vicariously, jointly and severally liable for the act of Encik Zainul Abidin. It is trite that parties are bound by their own pleadings and a party stands or falls by the four corners of his pleadings *Tan Leng Choo v. Law Teck Huat* [2008] 1 LNS 568. It follows therefore I do not have to consider matters raised outside the perimeters of the plaintiffs' pleading.

[13] The letter of approval dated 4 December 1996 relate to a procurement for which Encik Zainul Abidin was not competent to deal with. He had indiscriminately encroached into the jurisdiction of the Tender Board by doing so. I do not propose to dwell into the irregularities and non-compliances committed by Encik Zainul Abidin for his blatant disregard of the Government administrative and financial procedures. There are ample evidence proffered by the defendants' witnesses to indicate that non-compliance with the Treasury Instructions and Treasury Circulars are internal matters and a public officer would face disciplinary actions if guilty of such misconduct. Disciplinary action had been instituted against Encik Zainul Abidin and punishments had been meted out to him accordingly. The rule in *Turquand* would bear relevance in this respect but I do not think it serves any purpose to further pursue the matter. The effect of the testimonies of the defendants' witnesses are clear. The Instructions, Circulars, Surat Pekeliling Ikhtisas or Surat Siaran served as directives, guidelines and references meant for the smooth running of the organizations of the defendants. They are internal matters of the defendants and therefore cannot, to my mind, be imposed on the plaintiffs in the

same manner they are imposed on and apply to public officers. Thus, non-compliance by Encik Zainul Abidin in this respect bears no direct nexus to the plaintiffs' case. The relevancy is only to indicate the several irregularities that have emerged as a result of a dealing that had ran into trouble for want of conformity with the law.

[14] Based on the above reasons, I dismissed the plaintiffs' claims with costs.